

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

July 12, 2002 (4:51PM)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

Before Administrative Judges:

Thomas S. Moore, Chairman  
Dr. Charles N. Kelber  
Dr. Peter S. Lam

In the Matter of

DUKE COGEMA STONE & WEBSTER  
(Savannah River Mixed Oxide Fuel  
Fabrication Facility)

Docket No. 070-03098-ML

ASLBP No. 01-790-01-ML

Date: July 3, 2002

**DUKE COGEMA STONE & WEBSTER RESPONSE  
TO GEORGIANS AGAINST NUCLEAR ENERGY'S  
APPLICATION FOR SECURITY CLEARANCES**

**I. Introduction**

On June 7, 2002, Georgians Against Nuclear Energy (GANE) filed with the Atomic Safety and Licensing Board (Board) an "Application for Security Clearances."<sup>1</sup> On June 12, 2002, the Board issued a Memorandum and Order requiring Duke Cogema Stone & Webster (DCS) and the NRC Staff to file responses to GANE's Application by

<sup>1</sup> *Georgians Against Nuclear Energy's Application for Security Clearances*, June 7, 2002 ("Application").

July 5, 2002.<sup>2</sup> In accordance with the Board's Memorandum and Order, DCS hereby submits its Response to GANE's Application.

DCS understands that an individual desiring access to classified information may apply to the U.S. Government for the necessary security clearance. If granted, the clearance would enable such an individual to access classified information on a "need to know" basis. As late as April 18, 2002, GANE asserted that it would not need to obtain security clearances since it intended to retain experts who already had the necessary clearances.<sup>3</sup> Only on June 7, 2002—more than six months after GANE's contentions were admitted—did GANE file its Application with the Board.

## **II. Discussion**

The Board's Memorandum and Order directs DCS to "address each question, request, and issue raised by GANE's filing ... [including] the applicability of each regulatory provision referenced by GANE" and to "indicate whether there are any other applicable regulations that the Board should consider."<sup>4</sup> Since both the NRC and DOE have the authority to issue security clearances in appropriate circumstances, DCS discusses below the NRC and DOE requirements governing the issuance of security clearances and the granting of access to classified information if there is a "need to know."

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<sup>2</sup> *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), Memorandum and Order, June 12, 2002 (unpublished) ("Memorandum and Order").

<sup>3</sup> *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), Teleconference Transcript p. 12 (April 18, 2001).

<sup>4</sup> Memorandum and Order at 2.

A. NRC Requirements

1. 10 CFR Part 25 – NRC Clearance Procedures and Process

The NRC procedures and process governing the application for “access authorization” (defined as “an administrative determination that an individual . . . is eligible for a security clearance for access to classified information”<sup>5</sup>) are set forth in

10 CFR Part 25. Key components of those regulations, as relevant to GANE, are:

- The purpose of Part 25 is to “establish procedures for granting . . . access authorizations of . . . persons (e.g., individuals involved in adjudicatory procedures as set forth in 10 CFR part 2, subpart I) who may require access to classified information.” *See* 10 CFR § 25.1;
- It appears that the Office of the Executive Director for Operations (EDO) must “designate” GANE’s representatives if they are to be eligible for NRC-issued security clearances. *See* 10 CFR § 25.5 (defining “Access Authorization”);
- The request for a security clearance must be submitted to the “Cognizant Security Agency” (CSA) for processing in accordance with the CSA’s own requirements. *See* 10 CFR §§ 25.5 (defining “Cognizant Security Agency”) and 25.17. In this instance, either the NRC or the DOE will be designated the CSA;
- The forms, and directions for where to submit such materials if the NRC is the CSA are described in 10 CFR §§ 25.17 and 25.19;
- The NRC will not grant access to classified information obtained from another agency if that agency determines in writing that access should not be granted. *See* 10 CFR § 2.905(h)(2). This restriction assumes that the NRC has possession of the other agency’s classified information; and
- The granting of an “L” clearance authorizes a person to view certain Confidential Restricted Data and Secret and Confidential National Security Information, but only after a determination has been made by “an authorized holder of classified information that a prospective recipient requires access to specific classified information to perform or assist in a lawful and authorized governmental function under the

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<sup>5</sup> 10 CFR § 25.5.

cognizance of the Commission,” *i.e.*, “has a need to know.” See 10 CFR §§ 25.5 (defining “need to know”) and 25.15(b).

2. 10 CFR Part 10 – NRC Clearance Criteria

The NRC’s substantive criteria for determining whether or not to grant a clearance request (after submittals in accordance with the 10 CFR Part 25 procedures) are set forth in 10 CFR Part 10. Key components of Part 10, as relevant to GANE, are:

- Part 10 reiterates the provision in Part 25 calling for the EDO’s Office (in particular, the Deputy Executive Director for Management Services) to designate an individual before he or she may have access to classified information (10 CFR §§ 10.1 and 10.2); and
- The substantive criteria for eligibility are set forth in 10 CFR Part 10, Subpart B.

If the NRC is the CSA for GANE’s requests, then those requests presumably will be evaluated under the Part 10 criteria.

3. 10 CFR Part 95 – Facility Clearances

If access to classified information is sought at a facility or location outside an NRC facility, or at a facility that does not have an existing “Facility Security Clearance”,<sup>6</sup> 10 CFR Part 95 specifies the procedures for obtaining a “Facility Security Clearance.” Accordingly, unless the offices of Ms. Carroll, Dr. Lyman, and Ms. Curran have been cleared pursuant to 10 CFR Part 95, GANE’s representatives would not be able to view or possess classified information in their respective offices. Assuming GANE’s representatives acquire the proper individual clearances and “need to know” determinations, and are therefore permitted to view classified information at secured

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<sup>6</sup> 10 CFR § 95.15.

facilities, they would neither be permitted to copy or possess classified information, nor remove from the secured facility any notes containing classified information.

4. 10 CFR Part 2, Subpart I – Special Procedures for  
Adjudicatory Proceedings

10 CFR Part 2, Subpart I, was adopted pursuant to Section 181 of the Atomic Energy Act and establishes special procedures “in proceedings subject to this part” to “effectively safeguard and prevent disclosure of Restricted Data and National Security Information to unauthorized persons, with minimum impairment of procedural rights.”<sup>7</sup> While 10 CFR § 2.900 refers to “proceedings subject to this part” (*i.e.* 10 CFR Part 2), 10 CFR § 2.901 states that “[t]his subpart applies to all proceedings subject to Subpart G.” Therefore, Subpart I does not appear to apply to this modified Subpart L proceeding on the CAR.

Furthermore, even if Subpart I does apply to a Subpart L proceeding, it appears to come into force only with respect to information in the NRC’s possession, and does not cover discovery of classified information in the possession of a license applicant. For example, 10 CFR § 2.905(e) states that applications for orders granting access to classified information “not received from another Government Agency will normally be acted upon by the Presiding Officer.”<sup>8</sup> Section 2.905(e) also states that applications for orders granting access to classified information “where the information has been received by the Commission from another Government agency” will be acted upon by the Commission.<sup>2</sup>

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<sup>7</sup> 10 CFR § 2.900.

<sup>8</sup> Emphasis added.

<sup>2</sup> 10 CFR §§ 2.905(e)(1) and (2) (emphasis added).

Both of these provisions take as their premise that the classified information in question has been received and is in the possession of the NRC. Indeed, the Statements of Consideration supporting revisions to Subpart I make this clear:

As was true for the original Subpart I, the revised Subpart I applies only to classified information in the possession of or under the control of the Commission. It does not apply to discovery of classified information in the possession of or under the control of applicants for Commission licenses or permits or other persons or agencies. Requests for classified information in the possession or control of applicants or other persons or agencies would be governed by 10 CFR 2.740-2.742, and the Commission expects that any significant questions regarding discovery of such classified information in Commission proceedings would be certified to the ... Commission for decision.<sup>10</sup>

DCS therefore concludes that Subpart I is not applicable to GANE's discovery requests, but could be relevant to future discovery requests against the NRC Staff. Even if Subpart I did apply at this time, it appears to be supplementary to, and not a substitute for, the procedures and criteria set forth in 10 CFR Parts 25, 10 and 95. Therefore, if the NRC is the CSA, GANE must follow the procedures and criteria of Parts 25, 10 and 95.

The NRC Staff has stated that "the Board needs to certify to the Commission, pursuant to 10 CFR § 2.1209(k), its recommendation whether the Subpart I hearing procedures should be used here."<sup>11</sup> DCS has no objection to a Board certification to the Commission on the question of whether, and to what extent, the procedures of Subpart I

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<sup>10</sup> 41 *Fed. Reg.* 53328 (Dec. 6, 1976) (emphasis added) ("Statements of Consideration").

<sup>11</sup> E-mail from J. Hull (NRC OGC) to D. Curran (GANE Legal Advisor), May 16, 2002.

should be applied in this proceeding.<sup>12</sup> The Commission certainly has the power to impose Subpart I procedures, in whole or in part, by order, and the Statements of Consideration discussed above do encourage the Licensing Boards to certify “significant questions regarding discovery” to the Commission.<sup>13</sup>

If the Board chooses to certify this general question to the Commission, it should, however, request direction from the Commission on the following specific questions:

- (1) How are the procedures of Subpart I to be applied to classified information that is not yet possessed by the NRC (such as the classified portions of DCS’ physical security plans that will not be submitted to the NRC until the possession and use license application stage);
- (2) What did the Commission mean when it stated that classified information in the hands of license applicants “would be governed by 10 CFR 2.740-2.742” when those provisions, in and of themselves, do not authorize release of classified information; and
- (3) What is the proper balancing of GANE’s desire to access classified information in support of its case and the timely prosecution of the hearing on the CAR. On this latter question, DCS notes that the clearance process may take considerable time, or may ultimately result in a denial of GANE’s request, and that Subpart I itself recognizes that some “minimum impairment of procedural rights” may be necessary to properly safeguard classified information. *See* 10 CFR § 2.900.

#### **B. DOE Requirements**

DOE procedures for applying for access to classified information are very similar to the NRCs. According to the DOE’s Personnel Security Program Manual, a request for an access authorization can only be submitted after a determination that there is a need to

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<sup>12</sup> DCS opposes, however, GANE’s request that the Board certify its request for clearance to the Commission under 10 CFR § 2.905(e)(2). Application at 1-2.

<sup>13</sup> 41 *Fed. Reg.* 53328.

access the classified information. *See DOE M 472.1-1B* (July 12, 2001).<sup>14</sup> The access authorization request consists primarily of the following documents and forms:

- A cover letter requesting L-level access authorization and providing justification for processing of the request. The justification must describe in detail the duties of the position and categories/levels of information to be accessed;
- Verification of the individual's evidence of U.S. Citizenship;
- Standard Form 86—Questionnaire for National Security Positions;
- FD-258—Fingerprint Card;
- DOE F 472.1—Fair Credit Reporting Act Release Form; and
- DOE F 5631.18—Security Acknowledgement.

Access authorization requests are submitted to the cognizant DOE Office.<sup>15</sup>

The DOE's criteria and procedures for determining access to classified information are provided in 10 CFR Part 710. Similar to 10 CFR Part 25, it appears that the Secretary of Energy must "designate" GANE's representatives before they can be considered for DOE-issued security clearances (10 CFR §§ 710.1(a) and 710.2(d)). The regulations do not state how GANE is to ask for such a designation.

### C. "Need to Know"

In its Application, GANE states that it is seeking security clearances to review classified information "that has not yet been identified, but which GANE anticipates will

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<sup>14</sup> <http://www.directives.doe.gov/pdfs/doe/doetext/neword/472/m4721-1b.pdf>

<sup>15</sup> The cover letter is specified in DOE Order 472.1B, Attachment 1, p. 7 (June 24, 1997) (extended until August 18, 2002) (<http://www.directives.doe.gov/pdfs/doe/doetext/neword/472/o4721b.html>); the forms are specified in DOE M 472.1-1B, *supra* note 13, at II-1.



be generated in this proceeding.”<sup>16</sup> Although it is ultimately up to the CSA to make a “need to know” determination, DCS does not believe that GANE has a need to access classified information in order to litigate its admitted contentions.

There are two admitted contentions which serve as the basis for GANE’s request to obtain access to classified information. Contention 1 addresses the Material Control and Accounting (MC&A) “design bases” for the Mixed Oxide Fuel Fabrication Facility (MOX Facility) and Contention 2 addresses the physical security “design bases” for the MOX Facility.

GANE has no need for access to classified information to litigate Contention 1. On June 27, 2002, DCS submitted its responses to GANE’s first set of interrogatories.<sup>17</sup> In response to Interrogatory No. 13a., DCS provided GANE with the specific “design bases” for its MC&A program. None of that information is classified. Indeed even DCS’ Fundamental Nuclear Material Control Plan (FNMCP) is not expected to be classified. Thus, security clearances are not needed for discovery or evidentiary purposes for Contention 1, which alleges DCS failed to provide its MC&A design bases in the CAR.

Furthermore, GANE can litigate Contention 2 without access to classified information. Contention 2 alleges that DCS failed to include its physical security-related “design bases” in the CAR. The design bases will not include any classified information with the exception of the specific attributes of the “design basis threat” (DBT) mandated

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<sup>16</sup> Application at 2.

<sup>17</sup> *Duke Cogema Stone & Webster’s Objections and Responses To Georgians Against Nuclear Energy and Blue Ridge Environmental Defense League First Set of Interrogatories* (June 27, 2002).

by the NRC under 10 CFR Part 73. However, GANE could not challenge the DBT since such a challenge would be an impermissible attack on an NRC regulation.<sup>18</sup>

Furthermore, Contention 2 does not address the adequacy of DCS' design bases. Although GANE could conceivably submit a late-filed contention challenging the adequacy of those design bases, as stated above, none of the design bases, other than the DBT attributes, will be classified. Any future challenge to the adequacy of DCS' plans and programs for implementing the design bases would not be appropriate until the possession and use license application stage.

GANE framed a number of interrogatories in its first set of interrogatories that elicit, in part, classified information relating to DCS' physical security programs and plans. Most of those interrogatories, however, do no more than broadly ask DCS to identify or describe specific features or measures mentioned in general terms by the NRC Staff in a recent non-classified presentation to the NRC's Advisory Committee on Reactor Safeguards. DCS does not believe that the mere fact that GANE has framed discovery requests that could elicit classified information is sufficient, in and of itself, to demonstrate a "need to know."

**D. Impact of a Possible Delay or Denial of GANE's Clearance Requests**

Should the security clearance review process take an extended period of time, or for whatever reason, not result in the granting of the requisite clearances or an affirmative "need to know" determination, DCS does not believe that GANE's ability to effectively litigate its existing contentions would be jeopardized to any significant degree. In the

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<sup>18</sup> Of course, DCS' physical security-related plans and programs will involve some classified National Security Information, but those plans and programs will only be submitted to the NRC at the possession and use license application stage.

exercise of the Government's responsibility to protect classified information, both Section 181 of the AEA (and Subpart I to the extent it may be applied in this proceeding) contemplate that some impairment of procedural rights may be necessary.<sup>19</sup> Given GANE's lack of showing of any specific need, and the tangential relationship between such classified information in DCS' possession and the admitted contentions, DCS does not view a denial of access as more than a minimal intrusion on GANE's procedural rights.

**E. Sufficiency of L Clearance and Section 2.744(e) Protective Order**

The Board has also requested that DCS and the NRC Staff "address the role, if any, protective orders and affidavits of non-disclosure should play with regard to the type of information covered by the requested security clearance."<sup>20</sup> DCS provides the following response.

DCS' material control and accounting design bases are not classified, nor do they constitute "Safeguards Information" as defined in 10 CFR § 73.2. However, DCS' material control and accounting design bases, plans, and programs are protected from public disclosure and "deemed to be commercial or financial information" under 10 CFR § 2.790(d)(1). Since GANE's representatives have signed non-disclosure affidavits pursuant to the Board's June 29, 2001 Protective Order, and have executed letters agreeing that the terms of the non-disclosure affidavits and Protective Order apply to "any discovery related information provided by DCS in the CAR proceeding," these

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<sup>19</sup> See 10 CFR § 2.900.

<sup>20</sup> Memorandum and Order at 2.

arrangements should be sufficient to address non-classified, non Safeguards-related information relating to MC&A.

Regarding safeguards material, DCS does not believe that there are any safeguards materials that are relevant to the CAR proceeding. Details of DCS' physical security plans that are not classified may be considered Safeguards Information. (See Section 147 of the AEA, 10 CFR § 73.2, definition of Safeguards Information and 10 CFR § 73.21). Such information is subject to disclosure pursuant to a protective order issued under 10 CFR § 2.744(e), but only to persons with an "established need to know." See 10 CFR § 73.21(c). However, the physical security plans will only be submitted to the NRC at the possession and use license application stage and are only relevant to that stage of the MOX Facility proceeding.

GANE requests that the Licensing Board order DCS (and the NRC Staff) "to identify any other category of non-public documents that they will rely on in the proceeding regarding Contentions 1 and 2 for which a Level L security clearance and administrative protections under 10 C.F.R. § 2.744(e) would not be sufficient to provide GANE with access to the documents." No such order is necessary with respect to DCS. DCS is aware of no category of non-public documents upon which its experts may rely that would not currently be accessible through an L clearance or an appropriate protective order pursuant to 10 C.F.R. § 2.744(e) (subject to the applicable "need to know" requirements).

**F. Relevance of the Pending MOU**

GANE raises the pending Memorandum of Understanding between DOE and NRC. Since no such MOU is as yet in place, it does not appear relevant to GANE's Application at this time.

**G. Confidentiality of Personal Information**

GANE requests that the Board issue an order protecting the confidentiality of personal information to be submitted by GANE's representatives. DCS believes that such information is already adequately protected by 10 CFR § 2.790(a)(6) and that no such order is necessary.

**H. Access to Documents**

GANE's Application discusses its goal of seeking security clearances so that it is "able to review all documents that may be relevant to Contentions 1 and 2" and states that GANE "will seek access to classified documents ... and access to safeguards documents." Application at 6. DCS strongly objects to this aspect of GANE's Application. The Commission has made it clear that no document discovery is included in the discovery procedures for this proceeding and that, in lieu of document discovery, the parties are obligated to identify and make available for copying only those documents upon which the parties' experts plan to rely.<sup>21</sup> Accordingly, to the extent that GANE's Application suggests that it has a right to document discovery, DCS objects to the Application as beyond the scope of discovery established for this proceeding.

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<sup>21</sup> *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-13, 53 NRC 478 (June 14, 2001); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), Licensing Board Memorandum and Order (April 30, 2002) (unpublished).

## **I. Civil and Criminal Penalties**

The Board has requested that DCS and the NRC Staff “indicate what federal criminal and civil statutes are potentially applicable in the circumstances presented.”<sup>22</sup> DCS understands the Board to be inquiring about statutory criminal or civil penalties for violations of non-disclosure requirements for classified information, Safeguards Information, or information protected by 10 CFR § 2.790(d)(1). DCS has identified the following provisions:

- Chapter 18 of the Atomic Energy Act sets forth numerous statutory requirements and penalties governing non-willful and willful violations of the AEA. Specifically, the NRC has invoked Section 223 of the AEA to provide for fines up to \$20,000 and imprisonment for not more than 20 years for attempts to, conspiring to, or actually violating certain provisions of 10 CFR Part 25. *See* 42 U.S.C. § 2273.
- Title 18 of the United States Code provides for penalties as follows:
  - knowingly and willfully making any materially false, fictitious, or fraudulent statement or representation to the NRC or the DOE (unspecified fine and not more than 5 years imprisonment) (18 U.S.C. § 1001);
  - conveying without authority any record of the United States or made under contract with the United States (unspecified fine and not more than 10 years imprisonment) (18 U.S.C. § 641);

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<sup>22</sup>

Memorandum and Order at 2.

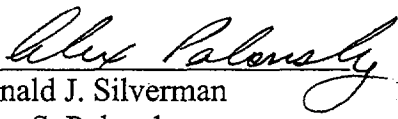
- unlawfully copying or attempting to copy documents connected with the national defense (unspecified fine and not more than 10 years imprisonment) (18 U.S.C. § 793); and
- communicating, delivering, or transmitting, or attempting to communicate deliver or transmit to a foreign government or faction, any document relating to the national defense (death or up to life imprisonment) (18 U.S.C. § 794).

### III. Conclusion

DCS does not object to the NRC Staff's recommendation that questions as to the applicability of Subpart I be certified to the Commission, but encourages the Board to include in its certification the specific questions posed above by DCS. Fundamentally, however, DCS does not believe that GANE will be significantly prejudiced should its requests be delayed or denied, and encourages the Board to resolve this matter in a manner that will ensure timely completion of the hearing process.

Dated: July 3, 2002

DUKE COGEMA STONE & WEBSTER

  
 Donald J. Silverman  
 Alex S. Polonsky  
 Marjan Mashhadi  
 Morgan, Lewis & Bockius LLP  
 1111 Pennsylvania Avenue, N.W.  
 Washington, DC 20004  
 Telephone: (202) 739-5502  
 Facsimile: (202) 739-3001

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:  
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|   | ) |                         |

**CERTIFICATE OF SERVICE**

I hereby certify that copies of "Duke Cogema Stone & Webster Response To Georgians Against Nuclear Energy's Application For Security Clearances" were served this day upon the persons listed below, by both e-mail and United States Postal Service, first class mail.

Secretary of the Commission\*  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
Attn: Rulemakings and Adjudications Staff  
(E-mail: [HEARINGDOCKET@nrc.gov](mailto:HEARINGDOCKET@nrc.gov))

Administrative Judge  
Thomas S. Moore, Chairman  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
(E-mail: [tsm2@nrc.gov](mailto:tsm2@nrc.gov))

Administrative Judge Charles N. Kelber  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
(E-mail: [cnk@nrc.gov](mailto:cnk@nrc.gov))

Administrative Judge Peter S. Lam  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
(E-mail: [psl@nrc.gov](mailto:psl@nrc.gov))

John T. Hull, Esq.  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
(E-mail: [jth@nrc.gov](mailto:jth@nrc.gov))

Dennis C. Dambly, Esq.  
Office of the General Counsel  
Mail Stop - O-15 D21  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
(E-mail: [dcd@nrc.gov](mailto:dcd@nrc.gov))



Glenn Carroll  
Georgians Against Nuclear Energy  
P.O. Box 8574  
Atlanta, Georgia 30306  
(E-mail: [atom.girl@mindspring.com](mailto:atom.girl@mindspring.com))

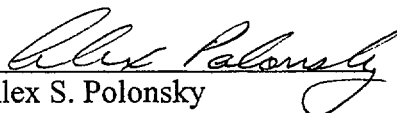
Office of Commission Appellate  
Adjudication  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
(E-mail: [hrb@nrc.gov](mailto:hrb@nrc.gov))

Louis Zeller  
Blue Ridge Environmental Defense League  
PO Box 88  
Glendale Springs, N.C. 28629  
(E-mail: [BREDL@skybest.com](mailto:BREDL@skybest.com))

Donald J. Moniak  
Blue Ridge Environmental Defense League  
P.O. Box 3487  
Aiken, S.C. 29802  
(E-mail: [donmoniak@earthlink.net](mailto:donmoniak@earthlink.net))

Mitzi A. Young, Esq.  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
(E-mail: [may@nrc.gov](mailto:may@nrc.gov))

\* Original and 2 copies

  
Alex S. Polonsky

July 3, 2002  
Date